United States Court of Appeals

for the Second Circuit

APPENDIX

76-2093

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALFRED LEWIS,

Petitioner-Appellee,

-against-

ROBERT J. HENDERSON,

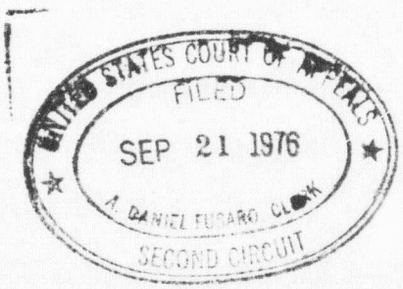
Respondent-Appellant

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
Attorney for Respondent-
Appellant
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3447



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PLAINTIFFS

ALFRED LEWIS
PETITIONER

DEFENDANTS FRANKEL, J

ROBERT J. HENDERSON, Sup't
Auburn Correctional Facility,
Respondent

8/13.

FWU

CAUSE

Petition for a Writ of Habeas Corpus
28 U.S.C. Sec. 2241

ATTORNEYS

Lawrence Stern
11 Monroe Place
Bklyn., N.Y. 11201

Louis J. Lefkowitz
Attorney General, NYS
2 World Trade Center, NYC 10047
488-3447

10/27/76

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

A

76 Civ 399 ALFRED LEWIS -v- ROBERT J. HENDERSON, Sup't Auburn

76 Civ 399
FRANKEL,J

DATE	NR.	PROCEEDINGS
1-23-76		Rec-vd from Northern District of N.Y. True Copy of Order, Docket Sheet, & all filed papers. Order states that Lawrence Stern, 11 Monroe Place, Bklyn., N.Y. 11201, is assigned as counsel for the petitioner. Copies of Memorandum & Order sent to the petitioner, counsel for the petitioner & the Att'y Gen. of the State of N.Y., 2 World Trade Center, N.Y.
		PROCEEDINGS, SDNY
1-23-76		Filed Notice of Assignment to Judge FRankel pursuant to Rule 2(c).
2-5-76		Filed Petitioners affdvt & notice of motion to amend application for a Writ of Habeas Corpus. Time & place to be set by Court.
3-8-76		Writ Issued for Alfred Lewis. Writ ret. 3-11-76.
4-5-76		Filed notice of hearing on W.H.C. begun & concluded. Dec. Res.
5-10-76		Filed pltffs motion to correct errots in recording &/or transcription (Transcript of 4-5-76)
5-19-76		Filed Memorandum & Order #44439, re corrections for the transcript of the hearing of 4-5-76, & as indicated the remaining claims of error are resolved as noted. The proposals for amendment are denied. So Ordered, FRANKEL,J. n/m
5-24-76		Filed Relator/Petitioner's memo of law in support of petition for Writ of Habeas Corpus.
5-24-76		Filed Respondent's Post-Hearing memo of law.
6-3-76		Filed petitioner's reply memorandum.
6-4-76		Filed Respondent's reply memorandum.
6-3-76		Filed transcript of record of proceedings, dated 4-5-76.
7-19-76		Filed Cja 21 to locate & interview possible witness....FRANKEL,J.
5-5-76		Filed CJA 21 for inspection & examination of Psychology report & possible testimony.....FRANKEL,J.
7-16-76		Filed Opinion & Order #44796. Alfred Lewis was convicted of bank robbery, grand larceny, & assault, after a jury trial in the NYS courts in 1958. He was sentenced to a term of 30 to 60 years. Since then, he has persistenly sought to have his conviction vacated on the ground, inter alia, that confrssions introduced at his trial were the product of physical & mental coercion. For the reasons indicated, in all these circumstances, the court holds that the admission of the confessions was harmful constitutional error. Accordingly, the petition should be, & it is granted. Petitioner will be released from custody unless the State brings his case on for retrial within sixty days. So Ordered, FRANKEL,J. n/m
8-5-76		Filed Respondent's memo in opposition to petitioner's motion to amend his pending application for a writ of habeas corpus.

Con't on Page #2

B

2.

DATE	PROCEEDINGS
8-12-76	Filed Memorandum & Order that since representation by counsel for Petitioner met the highest of professional standards, Mr. Stern's functioning was at all times commendable in the highest degree. These considerations have led me to approve the voucher in the full amount requested, namely, $1,931.78. Subject to further consideration by the Chief Judge of the Circuit, I believe the exception in this instance is warranted..... FRANKEL, J. n/m
8-13-76	Filed Respondent's notice of appeal to the USCA from the order granting petitioner's application for habeas corpus & from each & every part thereof ent. 7-16-76. Copies mailed to: Lawrence Stern, 11 Monroe Place, Bklyn, N.Y. 11201 & Alfred Lewis, #35610, Box B, Dannemora, New York, N.Y. 12929 & Warden, Box B, Dannemora, New York, N.Y. 12929.

A. E. Thompson

D. C. 109 Criminal Continuation Sheet

C

3.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES ex rel. ALFRED LEWIS, :

Petitioner, : NOTICE OF APPEAL

-against- : 76 Civ. 399

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, :

Respondent.

----------X

S I R S :

NOTICE is hereby given that Robert J. Henderson, respondent above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order granting petitioner's application for habeas corpus and from each and every part thereof entered July 16, 1976.

Dated: New York, New York
August 12, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
By:

DAVID L. BIRCH
Assistant Attorney General
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3447

TO: LAWRENCE STERN, ESQ.
11 Monroe Place
Brooklyn, New York 11201

ALFRED LEWIS
35610
Box B
Dannemora, New York 12929

STATE OF NEW YORK--DEPARTMENT OF CORRECTIONAL SERVICES

CLINTON CORRECTIONAL FACILITY

LEGAL LETTER

Mr David Birch, Esq.
Name Asst. U.S. Atty. General
Street & No. Two World Trade Center
City New York ..... State N.Y. 10047

When replying sign your full name and address. Give inmate's full name and number.

Box B
DANNEMORA, N. Y. 12929

Date July 30, 1976 .....

United States District Court
Southern District of New York

U.S.A. ex rel Alfred Rivera,
Petitioner,
v
R.J. Henderson, Supt. Auburn Cor Facility,
Respondent

76 Civ. 399

Conditional Notice of Appeal

Please take notice that the petitioner above named, should a notice of appeal be filed in this case by the above-named respondent, hereby appeals to the U.S. Court of Appeals for the Second Circuit from the order of the US District Court, Southern District of New York Frankel, J. dated July 16, 1976, to the extent that it denied relief on any of the contentions raised by the petitioner in the above-captioned application for a writ of habeas corpus

Dated: Dannemora, N.Y.

Alfred Rivera
Petitioner
Clinton Cor Facility
Box B — 35610
Dannemora N.Y. 12929

CC to: David Birch, Esq.
Asst U.S. Atty Gen
Two World Trade Ctr
N.Y.C. 10047

5

DO NOT SEND CASH OR STAMPS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel. ALFRED LEWIS,

Petitioner,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

76 Civ. 399

OPINION

- x

A P P E A R A N C E S :

Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, New York
Attorney for Petitioner

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
Two World Trade Center
New York, N.Y. 10047
Attorney for Respondent
Joel Lewittes, Esq.
David L. Birch, Esq.
Of Counsel

FRANKEL, D.J.

Alfred Lewis was convicted of bank robbery, grand larceny, and assault, after a jury trial in the New York State courts in 1958.[1] He was sentenced to a term of 30 to 60 years. Since then, he has persistently sought to have his conviction vacated on the ground,

inter alia, that confessions[2] introduced at his trial were the product of physical and mental coercion. These efforts started when, pursuant to a pro se coram nobis petition, a Huntley hearing was held in January 1970 by Justice Edward T. McCaffrey, who had presided at the original trial, to determine whether the confessions were the product of unconstitutional coercion. In an opinion dated March 24, 1970, Justice McCaffrey denied the application, finding that the confessions "were voluntarily made and were not the result of physical coercion of any kind." The decision was affirmed without opinion, 35 A.D.2d 1086, 316 N.Y.S.2d 191 (1st Dep't 1970), and leave to appeal to the Court of Appeals was denied. A pro se habeas corpus petition was then filed in the Western District of New York, again attacking the voluntariness of the confessions. Judge Curtin, in an unpublished memorandum opinion, denied the petition by order dated June 28, 1971, on the ground that the Huntley hearing had adequately determined the issue. Both Judge Curtin and the Court of Appeals denied a certificate of probable cause, and the Supreme Court denied certiorari.

Still moving pro se (although assisted by a brief of the Cornell Legal Assistance Project), petitioner filed the instant petition in the Northern District of New York on July 17, 1974, raising the voluntariness issue along

with the adequacy of the state court proceeding. The petition was denied by Judge Port. This time, however, the Court of Appeals granted a certificate of probable cause, assigned counsel, reversed "as to the issue of mental and psychological coercion", and remanded for a hearing to resolve the factual disputes on that issue. United States ex rel. Lewis v. Henderson, 520 F.2d 896 (2d Cir.), cert. denied, 96 S. Ct. 429 (1975).[3]

Judge Port continued the assignment of counsel and transferred the case to this district for a hearing, which was held on April 5, 1976. Having reviewed the evidence, which is summarized below, and the legal arguments of the parties, the court concludes that the writ must issue.[4]

I.

The evidence adduced at this court's hearing included the testimony of petitioner and of Dr. Lawrence Lichenstein, a psychologist, in support of the petition. Respondent presented Vincent Beckles and William Corbett, two of the detectives who questioned petitioner prior to his confessions. Exhibits included the transcript of the Huntley hearing, where Beckles and Corbett, but not petitioner, also testified, and the transcript of the trial, which included testimony of petitioner,[5] Beckles, and Corbett.

Petitioner's Testimony

At the hearing before this court, petitioner testified as follows:

He was picked up by the police at approximately 8:30 p.m. on February 17, 1958, and taken to the 30th Precinct, where he was questioned about some money the police claimed to have heard he possessed. When asked where he got the money, he said that he had won it gambling. The questioning started at a desk in a large room. After a few minutes there, petitioner was taken to a room containing "nine or ten beds," where he was seated in a chair. Initially, an Inspector Walsh asked most of the questions. Shortly after the interrogations began, a Detective Corbett came and actively participated in the questioning. Petitioner refused to tell where the money was, so he was beaten, primarily by Corbett and Walsh, but also by several others, as there were always six to eight, or more, people in the interrogation room. Later in his testimony, petitioner also recalled that Inspector Walsh

> "asked me if I wanted to call somebody, wanted to make a telephone call, and I didn't have this in mind, although when he said it I immediately thought of calling my family and I said yes. And he said, 'Well, if you cooperate, you can make a telephone call, you just tell us what we want to know and tell us where the money is and we'll let you call.' And I said -- when I said I couldn't do that, he said, 'Well, you can't make a telephone call.'"

Later that night, petitioner was taken to his apartment, where some of his clothing and personal property were gathered. He was then returned to the 30th Precinct, where the police "held an identification session where I was told to put on various articles of clothing and put on this hat and that hat, and so forth and stand before a peephole for identification purposes." There were several detectives in the "identification room," but apparently only petitioner was placed before the peephole for identification. Petitioner was then taken back to the room with the beds in it, where he was left for a few hours, although there "was always someone in the room with me."

The questioning resumed about 2 or 3 o'clock in the morning, at which time petitioner was told that he had been positively identified as the robber, and that he should admit the robbery, cooperate, and produce the money. No one ever told him that he had been arrested for the robbery, that he had a right to a lawyer and a right to remain silent, or that what he said could be used against him in a court of law. Petitioner continued to be beaten and questioned throughout the night. He had no food and was permitted no sleep. He saw detectives with coffee and sandwiches, "but I never was offered any food." The interrogations at the 30th Precinct continued into the morning of February 18th.

About noon or 1:00 p.m. on the 18th, petitioner was taken to the 42d Precinct. Lewis said that he was "tired, . . . weak, . . . exhausted, . . . almost beaten . . . ." at the time of the transfer. At some point, either shortly before or after being moved, he was told that he was being charged with an assault. When he got to the 42d Precinct, with Detective Corbett "running the show," petitioner was again questioned by several detectives concerning the location of the money.

One of the detectives - not Corbett - told petitioner that the assault charge would be dropped if he "cooperated, confessed and primarily produced the money."[6] When he refused, Corbett and the others started beating him again, and told him he would stay there until they got the money. After the beatings had continued for about half an hour, petitioner "couldn't . . . keep taking that kind of stuff" and told Corbett that the money was on a roof at an unspecified location. Petitioner did not, at this time, admit that the money was the bank money, but did agree to take the police to it.

Petitioner was then left alone for a few minutes in a detention pen. When Detective Beckles came to take him to get the money, petitioner refused to go, whereupon Beckles promised that "if I took him to the money that my contention that the money was mine as a result of gambling

winnings would not be - you know, would not be attacked . . . ." Fearing that the police might steal his money as they had his watch and gloves at the 30th Precinct,[7] Lewis insisted that a Mr. Joey Jones, whom he had seen in the 42d Precinct, would have to come along as a witness before he would even consider leading the police to the money.[8]

At this point, Beckles left the room and Corbett came in and told petitioner that he would "be smart to go along with Beckles, because if you don't get that money you are going to answer to me." Corbett then left the room. Beckles reentered and informed petitioner that it had been arranged for Jones to accompany them when they went for the money.

At about 2:00 p.m., petitioner, Jones, Beckles, and Cook, Beckles's partner, left to get the money. After the money had been retrieved and they were driving back, petitioner asked Detective Beckles for a receipt. Beckles promised him one when they got to the stationhouse. When they arrived back at the 42d Precinct at about 3:30 p.m., however, Corbett took charge again. He threatened that if petitioner did not shut up about the receipt, "you will get a receipt in the mouth," and told him to "come clean and admit to the robbery now because we've got the money." Corbett then took petitioner to a room

where Corbett beat him while he was held by another detective. After this last beating, petitioner confessed to the robbery.

Corbett then took Lewis to a squad room where Inspector Walsh, Detective Beckles, and several other police officers were gathered. In response to their questions, petitioner gave the answers Corbett had instructed him to before they entered the squad room. Then, after a short period of time in the detention pen, petitioner was taken into another room where he repeated his confession before an assistant district attorney and a stenographer. Petitioner was then taken downstairs and put in a cell, where he remained for the night. At about 10:00 a.m. on the morning of the 19th, he was arraigned.

Dr.Lichenstein's Testimony

Dr. Lichenstein, Chief Psychologist at Kings County Hospital, reviewed and interpreted two reports prepared at Bellevue Hospital in March and June of 1958 wherein the description of petitioner said: "Severe Character Disorder, Sociopath of the Schizoid Type; a type of individual, who, under stress and strain, may develop a psychotic episode in future." Dr. Lichenstein testified that a sociopath, in addition to possessing other maladaptive characteristics, "tends to be rather infantile and immature, has a low frustration tolerance and

[sic]prone to panic under stress." He described a psychotic episode as a "breakdown in ego functioning or a breakdown in the ability to think clearly . . . usually evidenced in confusion, disorientation." In response to a hypothetical question regarding petitioner's experiences prior to the confessions,[9] he concluded that it was more probable than not that petitioner had a psychotic break under the assumed conditions. He went on to say that even if petitioner had not experienced a psychotic episode as such, a person with his diagnosis would have suffered a weakening in his power to reason and to resist authority under the described circumstances.

Detective Beckles

Mr. Beckles, called by respondent, gave testimony essentially as follows:

In response to her telephone complaint to the police that a man had threatened her with a gun, Beckles arrived at Ms. Elizabeth Waller's apartment at about 8:30 p.m. on February 17th. As Beckles and Waller were emerging from an elevator in the apartment building on their way to the stationhouse, they encountered petitioner in the hallway. Ms. Waller said that this was the man who had threatened her. Thereupon, Beckles informed petitioner that Waller had made a complaint that petitioner had assaulted her and that he was taking him to police headquarters. Beckles took petitioner to the Detective

Squad of the 30th Precinct, where he was questioned first about the alleged assault. Petitioner said that he knew Ms. Waller because she lived in the same building as his mother, but denied any assault.

Detective Beckles, however, had called the 42d Precinct to have them bring any witnesses who might be able to identify the robber of the Bronx bank. This action was prompted by the fact that the complaining witness had stated that petitioner had given her a bag to keep which contained a large sum of money and a gun, and that, upon entering the stationhouse, Beckles had seen fliers relating to the bank robbery. The witnesses were brought down between 10 and 11 p.m., perhaps later. Although he did not take part in the identification proceedings that followed, he was informed that the witnesses had identified petitioner as the bank robber.

After the identification, petitioner was questioned by several detectives on and off during the entire night in the Precinct's "dormitory room." Detective Beckles, however, spent only about ten minutes questioning Lewis after he was identified. When petitioner was not being questioned, he was left in the squad room where he sat on a chair. Detective Beckles offered petitioner food during the evening at the time he was offering it to other detectives, but petitioner declined the offer.

Beckles does not know if petitioner ate or slept that night. Beckles never struck or beat petitioner.

During the course of the night, petitioner wanted to see a friend who came to the stationhouse. Beckles does not recall whether petitioner actually saw him or not. At one point during the course of the evening, Beckles went out with petitioner, presumably to get the clothing. Beckles went out at some other point with other detectives to search for the bank money in the apartment of a Mr. Johnson whose name and address had been obtained from the address book taken from petitioner at the time of his arrest.

By morning, the Borough Commander had decided to turn petitioner over to the 42d Squad on the bank robbery charge. Beckles drove petitioner to the 42d Precinct. There, Beckles continued to speak with petitioner, but did not participate in the interrogation. Beckles told petitioner that if the money was his, he could keep it, but he did not say petitioner could keep it no matter what. At the 42d Precinct, Beckles also told petitioner that the police at that precinct wanted the money, and that he (Beckles) was going to leave the 42d Precinct and would thereafter have nothing more to do with the proceedings. Eventually, Beckles, together with one of his partners, took petitioner and a friend to retrieve the money.

Detective Corbett

Detective Corbett, the other witness for respondent, testified that sometime after 10:00 p.m. on the evening of February 17, 1958, he received a telephone call from his precinct (the 42d) to the effect that the 30th Precinct was holding someone that they had reason to believe might be connected with a bank roppery he was investigating. After determining that the suspect had a space between his two front teeth,[10] Corbett called the 42d Squad and told them that he was going to the 30th Precinct and that they should arrange for the eyewitnesses to go there too.[11] Corbett arrived at the 30th Precinct shortly before midnight, and then remained all night. Upon his arrival, he was informed that the witnesses who had viewed petitioner had identified him as the robber.

Corbett had a brief conversation with petitioner that night, when petitioner accompanied him and other detectives to a residence in Harlem. Apart from that, Corbett did not interrogate petitoner that evening. During most of the night, Corbett was not with the higher-ranking 30th Precinct officers who were questioning petitioner.

As Corbett, Beckles, and Cook were driving petitioner between the 30th and 42d precincts the next morning, petitioner was questioned further and urged to take the police to the money. Corbett never told petitioner

that he would be kept at the stationhouse until they got the money and cannot recall if he ever promised him that he would help him if he revealed the location of the money. After more questioning at the Precinct, petitioner agreed to take Beckles and Cook to the money.

When petitioner returned from getting the money, he requested, but was not given, a receipt. Instead, Corbett took him into a bedroom and "convinced him in my way of thinking, I convinced him that he was really identified." Thereupon, without further urging, petitioner started his confession. After he told the whole story, Corbett took petitioner to the Squad Commander's Office and told him to "tell them now what you told me." He never told petitioner what to say. After petitioner repeated his confession in the squad room, the district attorney and stenographer were called.

Corbett does not recall that petitioner was ever offered any food in his presence or that he ever saw petitioner eat or sleep at either the 30th or 42d Precinct. Corbett testified that he never beat or struck Lewis. He did not advise petitioner of his constitutional rights. While he and his colleagues probably had grounds to arraign petitioner when he was turned over to them on the 18th and before he led them to the money, he was not arraigned until the 19th because the investigation had not been finished in time

to permit an earlier arraignment.

The testimony given on prior occasions, at trial and at the Huntley hearing, is essentially cumulative in nature. Some aspects bear mention, however. Petitioner's only prior testimony was at the trial; he did not testify at the Huntley hearing. At the trial, he testified that, at one stretch on the evening of the 17th, they left him in the room with beds for three or four hours. "Once in a while one detective would come in; he would leave, and another detective would also come in. You know, after the other one had left, and about -- I lost track of time -- but about three or four hours later they began questioning me." Petitioner stated that "when like I said one detective would stay in there for a while with me, and I did sort of doze off in a -- in the chair, they'd wake me up."

As for the events at the 42d Precinct, in his trial testimony, petitioner remembered being told that they were charging him with assault in Manhattan, and that the charge would be dropped if he took them to the money. He also said that he confessed "solely because of the threats and the beating and the lack of food," and that neither Detective Corbett nor the District Attorney had promised him anything. Nothing was said about being

denied a telephone call or about Mr. Beckles's alleged promise to accept his gambling earnings' story if he took them to the money.

Beckles and Corbett testified both at the trial and at the Huntley hearing. Beckles said nothing at either time about an offer of food to petitioner. At trial, Corbett was able to recall that he might have promised to help petitioner "a little" by promising to "help him if I could when I got to court if he would co-operate with us."

II.

The stubborness with which petitioner has pursued his constitutional claims during over 18 years of confinement was not matched on February 18, 1958, when he gave in after 19 hours or so and confessed to the bank robbery. Phrasing the test broadly, petitioner's confession violated due process, and was thus inadmissible at trial, if "the totality of circumstances" leading to the confession show that it was not "the product of a rational intellect and a free will. . . ." See Fikes v. Alabama, 352 U.S. 191, 197 (1957), Blackburn v. Alabama, 361 U.S. 199, 208 (1960).

The evidence in the now amplified record demonstrates that petitioner was worn down, that his will was overborne,

and that he yielded to a combination of fatigue, despair, and weakness, all produced by his captors and interrogators. This court would so hold upon the evidence and the record if this were the initial habeas proceeding. But our inquiry and the grounds of today's decision have been considerably narrowed by the mandate of the Court of Appeals. Focusing the general principles upon the circumstances of this case, that court has directed us to consider six factors touching the voluntariness of petitioner's confessions. Following that direction, we are driven compellingly toward the granting of the writ.

The higher Court instructed that six specified allegations, or clusters of allegations, by petitioner would require issuance of the writ if they could be sustained on the remand. Finding them to be sustained, or vindicated so substantially as to permit no other result, we reach the conclusion the mandate requires.[13]

> (1) "He was never once, during the whole period of pre-arraignment interrogation, advised of his right to remain silent or of his right to counsel."

This is undisputed. It is, of course, a solid factor favoring petitioner.

> (2) "According to Lewis he was arrested on the pretense of Mrs. Waller's alleged complaint, held for approximately 38 hours by the police during which time he was neither booked nor arraigned, and questioned during most of the first half of this period."

Although it does not appear that the arrest of the petitioner was "on a pretense," the remainder of the quoted factor, which is the portion that goes after all to the relevant issue of coercion and deprivation, is solidly established by the several records of evidence in this case. It is perfectly clear that the petitioner was held in close and isolated confinement for 38 hours during which he was neither booked nor arraigned. It is equally clear that he was questioned "during most of the first half of this period." As one detective told it, petitioner was "questioned about [the] money all night long", and he kept "insisting . . . all along during the night [that it was his money]", before he was broken on the following day and submitted to the will of his interrogators. Such interruptions as there were served only to accentuate the thoroughness of his subjugation and the futility of any attempt to resist.[14]

The extraordinary delay in arraignment, condemned by state no less than federal procedural law, was totally devoid of justification, at least once the night had passed.[15] As is evident from Detective Corbett's testimony, the delay was for the clear and explicit aim of having the petitioner under total control for the purposes of locating the money and extracting a confession before he was allowed access to anyone else or to any of the forms of the law's protection. In light

of the eye-witness identifications, it is obvious that the continuing "police interrogation was essentially incriminatory rather than merely investigatory in nature," United States ex rel. Castro v. LaVallee, 282 F. Supp. 718, 724 (S.D.N.Y. 1968), and must be condemned as such. See also United States ex rel. Montgomery v. Mancusi, 338 F. Supp. 1247, 1251 (S.D.N.Y. 1972).

> (3) "During his extended period of detention before and after confession, Lewis was not allowed to make any telephone calls, was not allowed to see anyone and, with one minor exception, saw and spoke to no one but the police."

Again, the record establishes conclusively the propositions in the quoted statement. The petitioner was completely walled off during the many hours of his custody. It was made clear to him that his situation of close and isolated custody could not be expected to change until he had done the officers' bidding. The "minor exception" from the condition of isolation from friends or family was solely a bargaining ploy to "encourage" Lewis to lead the police to the money. Solely for this purpose, they acceded to petitioner's request that his friend Jones could accompany them as a kind of witness.

So far as that is an "exception" at all, it is not one that diminishes the impact of petitioner's totally controlled environment during interrogation.

> (4) "Lewis was continuously interrogated throughout the night of February 17 and on into February 18 on an intermittent basis without being given any real opportunity to sleep or any substantial food."

Once again the record is clear to the point of being substantially undisputed on this significant set of conditions. This court has noted earlier the admittedly continuous character of the interrogation. There is no real question that the petitioner was deprived of food and sleep, with all the debilitating consequences of these conditions.

Some equivocal intimations that food was brought into or out of the room where petitioner was held are without significance for the main point that petitioner was neither given any food nor given any reason to hope that a request for it would be effective. Detective Beckles's testimony at the hearing that he offered petitioner food at the 30th Precinct is largely, if not totally, discredited by his failure to recall this act of benevolence at either the trial or the Huntley hearing.

Petitioner testified that he had not slept at all between the time of his arrest and his confession. None of respondent's witnesses could contradict his contention. To be sure, petitioner's trial testimony that he had been left alone for three or four hours on the night of the 17th in which he "dozed off" from time to time, only to be awakened on each occasion by one of his interrogators, casts doubt on his broader claim here of total sleep deprivation. However, it remains clear that petitioner slept very little, if at all, between the time of his arrest and confession.

In the end, the court finds that petitioner was in fact left to suffer the pangs of hunger and the impairments caused by sleeplessness. The effects of such deprivations can only have impaired his ability to think straight and resist pressure. They weigh heavily in the picture pointing toward the involuntariness of petitioner's confession.

(5) "Lewis, at the time of his confession, was a young 22-year old black man of limited education with apparently little prior experience with police methods, thus rendering him particularly susceptible to police pressure."

At age 22, the petitioner was certainly not as young as some whose names have been identified with confessions held invalid because their youthful wills

were "overborne." Nevertheless, the factor just quoted, already held significant by the Court of Appeals, remains a substantial one in the case. We have been repeatedly instructed that "the process of determining voluntariness involves more than 'a mere color-matching of cases' . . . ." Mancusi v. United States ex rel. Clayton, 454 F.2d 454, 456 (2d Cir.), cert. denied, 406 U.S. 977 (1972); Reck v. Pate, 367 U.S. 433, 442 (1961); Beecher v. Alabama, 389 U.S. 35, 38 (1967).

Though he was all of 22, this petitioner was diagnosed by contemporaneous psychological evaluations as a sociopath and "a type of individual, who, under stress and strain, [might] develop a psychotic episode in [the] future." Dr. Lichenstein testified that a sociopath "tends to be rather infantile and immature" and that it was more probable than not that petitioner "suffer[ed] a psychotic episode" in the conditions of extended custody and interrogation. While the court does not fully accept Dr. Lichenstein's conclusion, it seems highly likely that petitioner was relatively young (emotionally and intellectually as well as chronologically), unstable, and vulnerable at the time he was interrogated. Such characteristics rendered him particularly susceptible to police pressure.

It is true, as respondent stresses, that petitioner had already been imprisoned once for a serious criminal offense, and was thus no stranger to the forces of the criminal process. It does not follow by any means, and the record does not suggest, that he had significant "prior experience with police methods." So far as the law is concerned, "even a long criminal record" is not sufficient to erase or overcome such problems of immaturity, ignorance and simplemindness as our Court of Appeals identified, and as the Supreme Court has held important for decision of questions like the one now considered. See Davis V. North Carolina, 384 U.S. 737, 742, 752 (1966).

(6) "The police detectives made various promises to petitioner, including an offer to 'help' him with his case if he confessed and a pledge that his claim of ownership would not be challenged if he would only retrieve the money."

Once more, on this final topic, the proof is ample in favor of the petitioner. Rationally, in the comfort of the courthouse or a lawyer's office, it seems absurd to suppose that police would have told the petitioner "his claim of ownership would not be challenged" even if it turned out that he had robbed the money from a bank. Nevertheless, the record makes it evident that this is substantially what the police actually said, and it is even

more clear that this is what they contrived to lead him to believe. Indeed, the Court of Appeals in its first review of this case seems to have found from the existing record a promise by the officers "to accept his claim that the money in the briefcase was gambling winnings . . . ." 520 F.2d at 899. It has been evident from the time of petitioner's trial that the detectives who interrogated him were quite willing to lull and pressure him by promises of friendly assistance.[16] The several records of testimony are replete with specific promises of "help" in return for a confession. In sum, the sixth and last of the Court of Appeals standards is met beyond any serious question.

It follows, as the Court of Appeals said it should, that petitioner's "confession was obtained in violation of his Due Process rights."

III.

The respondent maintains that even if petitioner's confessions were involuntary, as the court has now held, their admission at his trial was harmless error. Assuming that the Circuit has not foreclosed this issue by its mandate,[17] this court rejects the argument on the merits.

It has been held that the admission of a coerced confession can, in rare circumstances, constitute harmless error. See United States ex rel. Moore v. Follette, 425 F.2d 925 (2d Cir.), cert. denied, 398 U.S. 966 (1970) (prior untainted confession also in evidence). This is not such an extraordinary case.

In addition to the involuntary confessions, the evidence introduced at petitioner's trial consisted of (1) the testimony and in-court identification by seven eye-witnesses, (2) the testimony of Elizabeth Waller that Lewis asked her to store a briefcase for him, which she later learned contained large amounts of packaged money, (3) a matchbox and sheet of paper upon which petitioner allegedly made, or directed Ms. Waller to make, computations as they counted the money contained in the briefcase, (4) testimony by Beckles and Corbett that petitioner had led them to approximately $8,000 in cash, including two $5 bills that had been marked by one of the bank tellers, (5) the money itself, and (6) the testimony of the patrolman who found the stolen car allegedly used by petitioner in the bank robbery.

The case against petitioner was strong even without the confessions. But not all of the other evidence was itself free from taint and other weaknesses. Whether or not the fact that Lewis led the police to marked money taken from the bank and the money itself are regarded as additional "confessions,"[18] it is clear that they at least suffer from the same constitutional taint, see Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), and must be disregarded as independent evidence. The testimony regarding the stolen getaway car must be discounted because, without petitioner's confessions, there would have been nothing to link him to the car. Similarly, while Waller's testimony and the computation slips were circumstantial evidence that petitioner had robbed the bank, they did not conclusively establish the origin of the money since petitioner never told Waller where he got the cash.

After disregarding the tainted evidence and discounting the evidence otherwise dependent upon the confessions, it is obvious that the court cannot say that "beyond a reasonable doubt," the confessions "did not contribute" to petitioner's conviction. Chapman v. California, 386 U.S. 18, 24 (1967). See also United States ex rel. Moore v. Follette, supra, 425 F.2d at 928. To be sure, the eye-witness

identifications, while not perfect,[19] were powerful independent evidence of petitioner's guilt. But nothing is quite so damning as a defendant's own admission of guilt. Here, unlike the situation in United States ex rel. Moore v. Follette, supra, all of petitioner's confessions were involuntary. See United States ex rel. Montgomery v. Mancusi, supra, 338 F. Supp. at 1252.

In all these circumstances, the court holds that the admission of the confessions was harmful constitutional error.

Accordingly, the petition should be, and it is, granted. Petitioner will be released from custody unless the State brings his case on for retrial within sixty days.

It is so ordered.

Dated, New York, New York
July 16, 1976

MARVIN E. FRANKEL
U.S.D.J.

FOOTNOTES:

1. All the charges related to the robbery of a branch of the Manufacturers Trust Company at 155th Street and Third Avenue in the Bronx at approximately noon on February 6, 1958.

2. There were actually three verbal confessions. The first was made to a Detective Corbett. Petitioner then repeated the same admissions before a number of other detectives, with Corbett by his side. Petitioner recounted his confession a third time before the District Attorney and a stenographer. All of these confessions were to the same effect and given within the space of an hour and a half on the same day. Copies of the recorded confession were introduced at petitioner's trial. Detective Beckles and Corbett testified concerning the two unrecorded confessions. Petitioner also asserts that evidence of his leading the police to marked money from the bank and the money itself constitute a fourth "confession." Although this characterization was apparently rejected by the state judge presiding over the Huntley hearing, it would seem that the same constitutional claims apply to this evidence as well.

3. The question whether petitioner was beaten, as he continues to swear, appears to have been resolved finally against him by the decision of the Court of Appeals. The Circuit upheld Judge McCaffrey's finding that petitioner's confession was not the result of physical coercion of any kind. 520 F.2d at 904. However, since Judge McCaffrey made no findings of fact, it is not perfectly clear whether he found that (a) there had been no physical abuse whatever or (b) whatever abuse there was, if any, did not cause petitioner to confess. It is at least arguable, then, that it might be open to this court to determine whether there were any beatings and, if so, whether they contributed to petitioner's allegedly coerced confessions. In the end, however, the court has concluded that the issues of physical abuse and physical coercion are foreclosed by the Circuit's decision and has assumed that petitioner was not beaten and that his confession was not physically coerced. While this bifurcation may effect a small note of unreality, the task of deciding only what the court was directed to decide has proved wholly manageable.

4. Before Judge Port, petitioner also raised the argument that the trial court had failed to properly charge the jury concerning voluntariness. The petition was denied on this ground:

> "Petitioner's second contention has previously been passed upon by Judge Curtin and found to be without merit. United States ex rel. Alfred Lewis v. Mancusi, supra, decision of August 3, 1971. I am satisfied that the ends of justice do not require this court to reexamine that determination, and this contention is also denied and dismissed. 28 U.S.C. §2244(a)."

Memorandum Decision and Order of Judge Port, 74 Civ. 366, at 4 (N.D.N.Y. August 20, 1974). The issue was not raised on appeal, see 520 F.2d at 903, and is not now before this court on remand, despite some belated attempts by petitioner to raise it in his post-hearing briefs. In any case, the contention having been twice denied on federal habeas applications, there is no persuasive reason to consider it again.

5. Petitioner's trial testimony was limited to the issue of the voluntariness of his confessions.

6. Petitioner made these remarks regarding the alleged promise:

> "You know, it is hard to say whether anything like that is going to have an effect, but I'm just saying this: when they got a little tougher . . . it is possible that I thought about that promise . . . and perhaps I think they moved me closer to the disclosure point. I am not saying it did."

7. Petitioner claims that the detective who made him empty his pockets kept his leather gloves and that another officer later confiscated his watch.

8. Later, petitioner testified:

> "I knew if I didn't [take them to the money], you know, I was going to be beaten again, you know, and like some fellow said, you know, that is the reason I was up there, they was keeping me there for that purpose. . . .
>
> "And the fact that they had played this game on me, you know, told me that they was going to -- told me that they was not going to contest my saying that the money was mine as a result of gambling monies, and that then after I got back, led them to the money and got back to the station -- got back to the precinct, you know, they made it clear, you know, that that was just a sham, you know, this also had an effect on my condition, you know, on bringing me closer to the point where I couldn't resist nothing else, you know."

9. "Is it possible that the individual described in that report, Doctor, subjected to sudden arrest, 19 hours of continuous interrogation overnight without food and sleep, without counsel from friends or lawyers, or anyone else on his side, subjected to a constant barrage of questioning, interrogation and accusations mixed in with promises of assistance . . . is it possible that the person described in that report under those circumstances had a psychotic break?" The original question contained the additional clause "and subjected to beatings." The question, however, was asked a second time without that clause.

10. One of the eye-witnesses recalled this feature after the identification fliers had been prepared.

11. Corbett later testified that detectives at the 42d Squad had already instructed the witnesses to go to the 30th Precinct, which would explain why at least some of the witnesses arrived at the Precinct between 10:00 and 11:00 p.m. and Corbett not until shortly before midnight.

12. At the hearing, Mr. Lewis explained:

> "I didn't testify to this at the original trial because I didn't know the value of this kind of testimony and apparently my lawyer, who -- at the trial, he was not familiar with all the factors of mental coercion because he didn't instruct me to testify in this regard . . . ."

13. The parties have briefed and argued the somewhat open question as to the burden of proof. There is substantial authority that in circumstances like the ones here, the burden is upon the State to establish the voluntariness of the confessions. United States ex rel. Castro v. LaVallee, 282 F. Supp. 718, 722 (S.D.N.Y. 1968); United States ex rel. Smith v. Yeager, 336 F. Supp. 1287, 1301-02 (D.N.J.), affirmed per curiam, 451 F.2d 164 (3d Cir. 1971); United States ex rel. Thurmond v Mancusi, 275 F. Supp. 508, 520-21 (E.D.N.Y. 1967); United States ex rel. Senk v. Brierley, 363 F. Supp. 51 (M.D. Pa. 1973).

As the record stands, however, there is no need to go nearly that far. Accepting respondent's position that the burden is petitioner's (by a preponderance of the evidence), this court reaches the findings and conclusions hereinafter outlined.

14. The interruptions included two, and perhaps three, trips with, and at the instance of, various detectives. The first was to petitioner's residence, which the police searched and from which they "seized" some clothes and other personal belongings. At some point in the early hours of the morning, detectives searched the apartments of two of petitioner's friends after obtaining their names and addresses from petitioner's address book. It is not entirely clear whether petitioner accompanied the detectives on this mission, but he was at least aware that it took place. The final "diversion" was the trip with Beckles, Cook, and Jones to Manhattan to retrieve the money. The car ride from the 30th to the 42d Precinct on the 18th does not qualify as an interruption because the detectives questioned petitioner throughout.

15. Both Detectives Beckles and Corbett testified that they thought arraignment would have been impossible before the morning of the 18th when the Criminal Court reopened.

16. Typically, one of the detectives quoted himself as saying: "Now, you have to put your trust in somebody, and we are the ones who can help you," and, the officer continued, "it was right after that that we sat down and he started to tell me" about his commission of the bank robbery.

17. Having concluded that there were unresolved factual issues as to mental and psychological coercion, the Court of Appeals remanded for a hearing "[s]ince a state court conviction tainted by an involuntary confession cannot stand under the Due Process Clause . . . ." 520 F.2d at 904. Having failed to raise the question of harmless error in the Court of Appeals, the respondent might be held to have waived the contention.

18. See note 2 supra.

19. After remand, petitioner attempted to inject the further claim that his conviction was based upon tainted identifications in court following impermissibly suggestive lineups. If the court were to reach that issue, it would be resolved against petitioner. While it appears that the out-of court identifications were indeed improper, in light of the witnesses' degree of certainty and the extensive cross-examination at trial, the in-court identifications did not violate due process and taint petitioner's conviction. See Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968). However, the out of court deficiencies do diminish to some degree the evidentiary value of the in-court identifications.

removing appellant from staff because of his belief that sterilizations and abortions should be performed. The judgment provided for the restoration of Dr. Watkins to staff privileges on condition that he not perform abortions or sterilizations contrary to the hospital's rules.

Dr. Watkins appeals from that part of the judgment which denied damages and unrestricted use of the hospital's facilities, maintaining that there was sufficient state action to confer jurisdiction. The hospital does not cross-appeal from the reinstatement order, concluding that the judgment is "well founded and totally without error".

We affirm.

[1] This circuit has repeatedly held that for state involvement with a private entity to confer jurisdiction under 42 U.S.C. § 1983 the involvement must be with the specific activity of which a party complains. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 313 (9th Cir. 1974). Further, the involvement must be significant and, as we stated in *Ascherman v. Presbyterian Hospital of Pacific Medical Center*, 507 F.2d 1103 (9th Cir. 1974):

> The mere receipt of Hill-Burton funds, even coupled with the alleged tax exemptions, is not sufficient connection between the state and the private activity of which appellant complains to make out state action. . . . Since there is no state action, the termination of appellant's staff privileges need not conform to the constitutional commands of the Fourteenth Amendment.

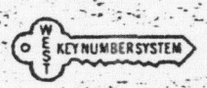
507 F.2d at 1105. *See also, Aasum v. Good Samaritan Hospital*, 395 F.Supp. 363 (D.Or.1975).

[2] Dr. Watkins does not assert that the state had any connection with the hospital's refusal to renew his staff privileges, but rather rests his prayer for relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) solely on the hospital's receipt of Hill-Burton funds. *Compare Simkins v. Moses Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963); *Aasum v. Good Samaritan Hospital*, 395 F.Supp. 363 (D.Or.1975). The district court's finding that it lacked jurisdiction under the above cited statutes was proper.

We find no abuse of discretion in the lower court's denial of attorney's fees.

Affirmed.

ment Disabilities Services and Facilities Construction Act after June 18, 1973, may—
(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."



UNITED STATES of America ex rel. Alfred LEWIS, Petitioner-Appellant,

v.

Robert J. HENDERSON, Superintendent of Auburn Correctional Facility, Respondent-Appellee.

No. 819, Docket 74-2655.

United States Court of Appeals, Second Circuit.

Argued April 1, 1975.

Decided June 4, 1975.

State prisoner filed a petition for a writ of habeas corpus wherein he alleged that he was imprisoned on basis of state bank robbery conviction which was unconstitutionally obtained. The United States District Court for the Northern District of New York, Edmund Port, J., entered an order which denied the petition, and petitioner appealed. The Court of Appeals, Mansfield, Circuit Judge, held that allegation that defendant was young, of limited education, arrested in

questionable circumstances, questioned all night, denied sleep and food, deceived by false promises of help and completely deprived of the support of counsel or friends until he confessed, alleged factors which, if proved, would establish that defendant's confession was obtained under circumstances of mental coercion in violation of due process.

Affirmed in part, reversed in part and remanded.

1. Criminal Law ⇐412.2(3)

In pre-Miranda case, failure of police during interrogation to advise defendant of his right to remain silent or of his right to counsel is significant in the calculus of coercion. U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐266.1(1, 2, 4)

Allegations that defendant was young, of limited education, arrested in questionable circumstances, questioned all night, denied sleep and food, deceived by false promises of help and completely deprived of the support of counsel or friends until he confessed, alleged factors which, if proved, would establish that defendant's confession was obtained under circumstances of mental coercion in violation of due process. U.S.C.A. Const. Amend. 14.

3. Habeas Corpus ⇐59

A hearing on habeas corpus petition is required if state evidentiary hearing failed to resolve merits of factual dispute or was not "full and fair." 28 U.S.C.A. § 2254(d).

4. Habeas Corpus ⇐90

Record in habeas corpus proceeding established that state judge had found confession to be voluntary because he disbelieved allegations of physical abuse while ignoring allegations going to mental coercion and hence finding of voluntariness could not be construed to have resolved factual disputes as to mental coercion or to have even reached a decision on that issue; district court was required to hold an evidentiary hearing on assertion of mental coercion. 28 U.S.C.A. § 2254(d).

5. Habeas Corpus ⇐113(12)

Court of Appeals could not assume from opinion following state hearing and from record on habeas corpus appeal that state judge had applied incorrect constitutional standards to issue of physical coercion of confession.

6. Habeas Corpus ⇐85.5(7)

Record in habeas corpus proceeding supported determination of state judge that confession did not result from physical coercion. 28 U.S.C.A. § 2254(d).

7. Habeas Corpus ⇐120

Denial of petitioner's prior application for habeas corpus relief in federal court could not bar consideration of subsequent petition, even though claims presented in subsequent application were also presented in prior application, where petitioner's allegations concerning mental or psychological coercion of confession raised issues of fact that were not resolved and probably not even considered by state court and such issues were apparently ignored on prior habeas corpus petition which resulted in a decision without a hearing or mention of mental coercion issue.

8. Constitutional Law ⇐266.1(1)

A state court conviction tainted by an involuntary confession cannot stand under due process clause. U.S.C.A. Const. Amend. 14.

Lawrence Stern, Brooklyn, N.Y., for petitioner-appellant.

David L. Birch, Deputy Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen., of the State of New York, Irving Galt, Asst. Atty. Gen., New York City, of counsel), for respondent-appellee.

Before ANDERSON, MANSFIELD and OAKES, *Circuit Judges*.

MANSFIELD, *Circuit Judge:*

Alfred Lewis, a state prisoner serving a term of 30 to 60 years for bank rob-

bery,[1] appeals from an unreported decision and order of the United States District Court for the Northern District of New York, Edmund Port, *Judge*, denying his petition for a writ of habeas corpus. Lewis alleged, *inter alia*, that his conviction was obtained through the use of his physically and mentally coerced confession and that state determinations of the voluntariness of his confession were factually and procedurally deficient. The district court denied his petition without a hearing on the ground that the state had accorded him a full and fair post-trial hearing on voluntariness and that the state hearing judge's determination of voluntariness was adequately supported by the record and the law. While we agree that the state court determination adequately determined voluntariness so far as physical coercion is concerned and we affirm as to that issue, we reverse and remand as to the claim of mental and psychological coercion because that allegation has never been sufficiently developed and passed upon by either a state or federal court.

Just after noon, on February 6, 1958, a bank at 155th Street and Third Avenue, Bronx, New York, was robbed of $12,000 by a lone gunman. Eleven days later, on February 17, at approximately 8:30 P.M., petitioner, then a 22-year old black man with a 9th grade education, was arrested in the lobby of an apartment building in Manhattan. According to police testimony given at the robbery trial and questioned by Lewis, he was arrested on the complaint of a Mrs. Elizabeth Waller, a resident of the apartment building. She had earlier related to the police that petitioner, on February 8 or 10, had left a briefcase containing a large sum of money in her apartment. When he returned for it on February 16 he told Mrs. Waller that $1,700 was missing and that he would return for it, an apparent threat which prompted Mrs. Waller to go to the police.

Upon arrest Lewis was immediately taken to the 30th Precinct headquarters where he was kept overnight until about noon of the next day, February 18. He was not booked on any charges and was not arraigned before a Magistrate on that night or the next morning.

The events at the 30th Precinct are in dispute. Petitioner testified on voir dire at his trial that from the time he arrived at the police station until the next morning he was subjected to interrogation and beatings by police officers, was not given any food and was denied the opportunity to sleep. The interrogation, he testified, related to the Bronx bank robbery, not Mrs. Waller's complaint, and petitioner was urged to confess and disclose the location of the robbery proceeds. The testimony of police officers present at the 30th Precinct during most of Lewis' stay there flatly contradicted his allegations of beatings. Other aspects of Lewis' story are corroborated or uncontradicted, however. The police witnesses agreed that Lewis was interrogated intermittently at the 30th Precinct throughout the night about the Bronx robbery. None of them knew whether petitioner had been given any food or allowed to sleep in the short intervals between interrogation sessions. Finally, a lineup and various showups were apparently held during the night and the next morning, with several witnesses to the robbery identifying petitioner as the perpetrator.

At about noon on February 18 petitioner was taken by several detectives to the 42d Precinct headquarters in the Bronx, near the scene of the robbery. He claims that he was again subjected to interrogation and beatings and had still neither been given food nor allowed to sleep. Again the police denied the alle-

1. At the time when this appeal was heard Lewis had been transferred to the West Street Detention Center, a federal prison in Manhattan, to await trial on federal bank robbery charges. The charges stemmed from his alleged robbery of a bank while he was out of prison for a short period of time in order to look for a job in anticipation of being paroled from state prison.

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gations of beatings, agreed that the interrogations took place, but did not know whether petitioner had been allowed to eat or sleep. During this period the police tried to convince Lewis to cooperate by promising to drop criminal charges pending in another jurisdiction and to accept his claim that the money in the briefcase was gambling winnings, if he would agree to lead them to the money.

Lewis finally gave in at about 2:00 P.M. on February 18 and, in the company of a friend, led the police to the money. Shortly after his return to the 42d Precinct, at about 3:30 P.M., he confessed after further promises of help from the police in the disposition of his case. The confession was repeated in the presence of more detectives and given a third time to an Assistant District Attorney and a stenographer.

On the night of February 18 Lewis was held at the 42d Precinct in a detention cage. He tried to sleep on the floor and had only some candy bars to eat, which a uniformed officer had brought at his request. The next morning he had a bowl of soup and was finally arraigned at 10:00 A.M. on February 19 on bank robbery charges. There was no police testimony to contradict his description of this aspect of his confinement.

It is uncontested that not once during his 38 hours of detention by the police was Lewis ever advised of his right to remain silent or of his right to counsel. In addition, he was at no time allowed to see or speak to anyone but the police, except during the expedition to retrieve the money.

Petitioner's trial began on October 6, 1958. Copies of his confession were introduced into evidence in the face of his objection that it was both false and the product of illegal coercion. Pursuant to the procedure in use in New York at that time both of these issues were left for the jury to resolve on the basis of the evidence and the law. Lewis, along with several police officers, testified on voir dire to their respective versions of the facts as related above. He was found guilty of the robbery and sentenced to 30–60 years imprisonment. The Appellate Division affirmed without opinion, *People v. Lewis*, 10 A.D.2d 924, 202 N.Y.S.2d 1001 (1st Dept. 1960), and leave to appeal to the Court of Appeals was denied.

Pursuant to a pro se coram nobis petition filed by Lewis in the state court, a *Huntley* hearing[2] was held in January 1970 by Justice Edward T. McCaffrey, who had presided at the original trial, to determine whether the confession was the result of illegal coercion. At the outset of the hearing Lewis, speaking for himself, asked the court to consider and determine "whether defendant's constitutional rights were violated when the Court at Page 667 of the trial record[3] refused defendant's request to charge the jury, that it must disregard the confession if it found it to have resulted from mental or psychological pressure and expressly limit [sic] the jury to consideration of physical pressure deciding whether it should accept, or disregard the confession, as per the original corum nobis petition verified August 11, 1969, and the defendant's traverse, connected therewith verified September 8th, 1969, since in view of what has just been said, the jury has not properly passed upon the question of voluntariness as indi-

2. Held pursuant to *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), New York State's procedural response to *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

3. The trial record reveals the following request of Lewis' trial counsel and the trial judge's ruling:

"Mr. Kunstler: And secondly, your Honor, that the jury may take into consideration in determining whether the confession was coerced or not the mental condition of the defendant and the length of time he was held by the police prior to his arraignment.

"The Court: The Court will charge that in deciding whether the defendant was coerced into confessing, the jury may take into consideration the length of time in which he was held by the police prior to arraignment and any physical pressure applied to him. You have an exception as to my omitting the mental or psychological." (Trial Minutes 667).

cated, in People versus Huntley 15, N.Y. 2nd Series, at Page 78." (Hearing Minutes 21–22). This request was thereupon denied by Justice McCaffrey. The evidence consisted of the transcript of the original trial testimony concerning the circumstances surrounding the confession, augmented by testimony of two new witnesses corroborating petitioner's claim of beatings and by further police testimony contradicting the beatings claim. The hearing record reveals that this evidence was introduced in an effort, notwithstanding Justice McCaffrey's earlier denial of Lewis' motion attacking the confession on grounds of mental coercion, to prove such coercion. Counsel for Lewis argued to the court that the circumstances surrounding the obtaining of the confession were "inherently coercive" (Hearing Minutes 89) and the district attorney responded "[s]o certainly, we can't say that any interrogation that took place the night before so affected his mind, that he could not . . . . that his subsequent confession was involuntary." (*Id.* at 92). In an opinion dated March 24, 1970, which summarized in narrative form the evidence received by him, Justice McCaffrey concluded that the confession was "voluntarily made" and "not the result of physical coercion of any kind." The decision was affirmed on appeal without opinion, *People v. Lewis*, 35 A.D.2d 1086, 316 N.Y.S.2d 191 (1st Dept. 1970), and leave to appeal to the Court of Appeals was denied.[4]

Lewis filed a pro se habeas corpus petition in the Western District of New York, received on May 6, 1970, again attacking the voluntariness of his confession on grounds of physical and mental coercion. This was denied by Judge Curtin on June 28, 1971, on the ground that the *Huntley* hearing had adequately and fairly determined the issues as to voluntariness. A certificate of probable cause for an appeal was denied by both Judge Curtin and this Court and certiorari was denied by the Supreme Court.

Undaunted, petitioner filed this habeas corpus petition pro se in the Northern District of New York, received on July 17, 1974, raising, *inter alia*, the voluntariness issue again along with the adequacy of the state court proceedings. Judge Port denied the petition essentially on the basis of the earlier decisions of Judge Curtin and Justice McCaffrey. We granted a certificate of probable cause permitting the instant appeal and permitted assignment of counsel.

DISCUSSION

Putting aside the claim of physical abuse for the moment, the first question to be resolved on this appeal is whether the facts alleged by Lewis, if proven, would make out a case of unconstitutional mental coercion. Over the years the Supreme Court has created various formulations of the standard governing the admissibility of confessions under the Due Process Clause of the Fourteenth Amendment. Generally, if a defendant's "will was overborne," *Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961), or if the confession was not "the product of a rational intellect and a free will," *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960), it must be excluded from the evidence at trial on the ground that it was impermissibly coerced. Such general standards have been of but limited utility, however, when one is called upon in a particular case to decide whether, in "[t]he totality of the circumstances that preceded the [confession]," *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957), a particular suspect was forced to confess against his will.

[1] Fortunately, there are now a significant number of Supreme Court deci-

4. In view of these extensive state proceedings which presented all of the issues raised on this appeal to the highest New York State court, the state could not, and does not, contend that petitioner Lewis has failed to exhaust his state remedies. See, e. g., *United States ex rel. Ross v. LaVallee*, 448 F.2d 552 (2d Cir. 1971).

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sions which go beyond general expressions of standards and explicate particular factors or groups of factors which, when included in the totality of circumstances, require that a resulting confession be invalidated on grounds of coercion. Applying these standards, petitioner alleges facts which would, if established, mandate a finding that his confession was obtained in violation of his Due Process rights. For present purposes the significant allegations made by him are the following:

(1) He was never once, during the whole period of pre-arraignment interrogation, advised of his right to remain silent or of his right to counsel. Although this is a pre-*Miranda* case, this failure on the part of police in a particular case has long been recognized as significant in the calculus of coercion. *Davis v. North Carolina*, 384 U.S. 737, 740–41, 86 S.Ct. 1344, 16 L.Ed.2d 360 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 609–10, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

(2) According to Lewis he was arrested on the pretense of Mrs. Waller's alleged complaint, held for approximately 38 hours by the police during which time he was neither booked nor arraigned, and questioned during most of the first half of this period. Extremely long periods of confinement coupled with successive periods of questioning, such as occurred here, usually tend to pressure a defendant into saying what the police want in order to stop the steady pressure. *Clewis v. Texas*, 386 U.S. 707, 711–12, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967).

(3) During his extended period of detention before and after confession, Lewis was not allowed to make any telephone calls, was not allowed to see anyone and, with one minor exception, saw and spoke to no one but the police. This sort of isolation denies a defendant psychological support from friends, relatives and counsel, putting him at an extreme disadvantage when confronting the police. *Haynes v. Washington*, 373 U.S. 503, 511, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Haley v. Ohio*, 332 U.S. 596, 599–601, 68 S.Ct. 302, 92 L.Ed. 224 (1948).

(4) Lewis was continuously interrogated throughout the night of February 17 and on into February 18 on an intermittent basis without being given any real opportunity to sleep or any substantial food. The debilitating effect of such treatment on a defendant's will and mind has long been recognized by the Supreme Court. *Payne v. Arkansas*, 356 U.S. 560, 567, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); see *Clewis v. Texas, supra*, 386 U.S. at 712, 87 S.Ct. 1338.

(5) Lewis, at the time of his confession, was a young 22-year old black man of limited education with apparently little prior experience with police methods, thus rendering him particularly susceptible to police pressure. *Haley v. Ohio, supra*, 332 U.S. at 599–601, 68 S.Ct. 302; see *Davis v. North Carolina, supra*, 384 U.S. at 742, 86 S.Ct. 1344.

(6) The police detectives made various promises to petitioner, including an offer to "help" him with his case if he confessed and a pledge that his claim of ownership would not be challenged if he would only retrieve the money. Furthermore, his agreement to retrieve the money and his confession followed soon after these false promises, underscoring their effect upon his will. *Lynumn v. Illinois*, 372 U.S. 528, 531–35, 83 S.Ct. 817, 9 L.Ed.2d 922 (1963); *United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir.), *cert. denied*, 377 U.S. 967, 84 S.Ct. 1648, 12 L.Ed.2d 737 (1964); see *Bram v. United States*, 168 U.S. 532, 542–43, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

[2] Of particular relevance here are the Supreme Court's decisions in *Haynes v. Washington, supra*, and *Haley v. Ohio, supra*. The defendant in *Haynes* was held incommunicado for 16 hours while the police questioned him until he confessed. He was not advised of any of his rights and the circumstances of his confinement implied that he would be allowed to see no one until he confessed. In *Haley* the defendant was a young boy who was arrested at midnight and ques-

tioned all night without benefit of counsel or of a friend to advise him. He finally confessed five hours later when confronted with the alleged confessions of his alleged accomplices. Although not all of the factors of *Haynes* or *Haley* (or of any other case for that matter) are present here, the same type of techniques designed to overbear the defendant's will were allegedly used. Defendant is described as young, of limited education, arrested in questionable circumstances, questioned all night, denied sleep and food, deceived by false promises of help and completely deprived of the support of counsel or friends until he confessed. Here, as in many similar cases, e. g., *United States ex rel. Weinstein v. Fay*, 333 F.2d 815 (2d Cir. 1964); *United States ex rel. Williams v. Fay*, 323 F.2d 65 (2d Cir. 1963), *cert. denied*, 381 U.S. 945, 85 S.Ct. 1788, 14 L.Ed.2d 709 (1965); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896, 76 S.Ct. 155, 100 L.Ed. 788 (1955), we cannot avoid the conclusion that these facts, if proved, would establish that Lewis' confession was obtained in circumstances which overcame his will. Its use against him at his trial would therefore violate his Due Process rights. *Reck v. Pate, supra.*

[3] Since we find that Lewis has alleged mental coercion amounting to a deprivation of Due Process we must determine whether, under *Townsend v. Sain*, 372 U.S. 293, 310–19, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and 28 U.S.C. § 2254(d),[5] the district court was required to hold a hearing on his factual contentions, see *Procunier v. Atchley*, 400 U.S. 446, 451–52, 91 S.Ct. 485, 27 L.Ed.2d 524 (1971). Such a hearing is, of course, required if the state evidentiary hearing failed to resolve the merits of the factual dispute or was not "full and fair." *Townsend v. Sain, supra*, 372 U.S. at 313, 83 S.Ct. 745.

[4] There is no question here that a state evidentiary hearing was held on the issue of voluntariness and that the decision was adverse to petitioner. We must still decide, however, whether that hearing resolved the merits of the claim of mental coercion and was "full and fair." It is petitioner's contention that the state *Huntley* hearing was fatally deficient because of the court's failure to pass upon his claims of mental and psychological coercion.

The *Huntley* hearing judge concluded in his opinion that Lewis' confession was "voluntarily made" and "not the result of *physical* coercion of any kind." (Emphasis supplied) There was no conclusion specifically addressed to mental coercion. The opinion itself contains no explicit findings of fact. It simply recounts the relevant testimony, emphasizing portions dealing with physical abuse, based on the transcript of the original trial and the testimony of live witnesses at the hearing. The only hint of the judge's view of the facts is his observation concerning the credibility of Lewis and the two witnesses called by him and discrepancies in the tales recounted by each. The opinion makes no attempt to resolve these discrepancies, however.

Clearly, the hearing judge did not believe Lewis' allegations of physical abuse. This is the only conclusion that can be drawn from his statement that no physical coercion was used. On the other hand, the opinion is silent as to mental coercion. The bald statement that the confession was "voluntarily made" might, standing alone, mean that the allegations concerning mental coercion were not believed. However, when considered in the context of the earlier trial and of the later *Huntley* hearing it is clear that Justice McCaffrey did not believe that the allegations of mental coercion made out a constitutional violation and that he accordingly was not giving them consideration. At Lewis' original trial he had erroneously refused to instruct the jury that Lewis' "mental condition" should be considered by it in determining the voluntariness of the con-

5. 28 U.S.C. § 2254(d) is treated in this Circuit as, in essence, a codification of the hearing criteria of *Townsend v. Sain, supra.* *United States ex rel. Hughes v. McMann*, 405 F.2d 773, 776 (2d Cir. 1968).

fession.[6] Instead he charged that the length of time in police custody before arraignment and physical abuse were the relevant factors to be considered by the jury, granting "an exception as to my omitting the mental or psychological." There is no indication in his *Huntley* opinion that either his view of the law had changed or that mental coercion was actually considered. On the contrary, at the outset of the *Huntley* hearing he denied Lewis' motion to expand the hearing to reconsider his earlier ruling that the jury should not be instructed that it "must disregard the confession if it found it to have resulted from mental or psychological pressure," thus reaffirming his view limiting "the jury to a consideration of physical pressure." This view is confirmed by his emphasis in his *Huntley* hearing opinion upon evidence with respect to physical abuse in the recited testimony, which makes up the bulk of the opinion, to the exclusion of evidence indicating mental coercion. Viewing the record as a whole we conclude that the state judge found the confession to be voluntary because he disbelieved the allegations of physical abuse while ignoring the allegations going to mental coercion. The finding of voluntariness thus cannot be said to have resolved any of the factual disputes noted above as to mental coercion or even reached a decision on that issue. *Cunningham v. Heinze*, 352 F.2d 1, 3–4 (9th Cir. 1965), *cert. denied*, 383 U.S. 968, 86 S.Ct. 1274, 16 L.Ed.2d 309 (1966); *United States ex rel. Kenney v. Fay*, 232 F.Supp. 899 (S.D.N.Y.1964).[7]

This case then falls into the first category of cases in which an evidentiary hearing must be held by the district court under *Townsend v. Sain, supra*, 372 U.S. at 313–16, 83 S.Ct. 745, and 28 U.S.C. § 2254(d). That is, the merits of the factual dispute surrounding the existence of mental coercion were not resolved in the state hearing. No specific factual findings were made and the federal court cannot reconstruct the state findings, if any, because there is a strong indication that a portion of the applicable constitutional doctrine was misapplied or ignored. *Id.*

[5, 6] Turning to the allegations of physical abuse, the situation is wholly different. The *Huntley* judge certainly considered this issue both at the original trial and at the later hearing. His opinion recounted all of the testimony on the issue of physical abuse and specifically concluded that the confession did not result from such treatment. We cannot assume from the *Huntley* hearing opinion and the record on this appeal that the *Huntley* judge applied the incorrect constitutional standards to this issue, see *LaVallee v. Delle Rose*, 410 U.S. 690, 93

6. Lewis also attacked, without success, this apparently erroneous jury instruction in state collateral proceedings and in the pro se habeas corpus petition filed in this case. On this appeal the issue is not raised and need not be considered in light of our disposition of the case.

7. This case may be favorably contrasted to *LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (*per curiam*), in which the Supreme Court reversed a decision of this court upholding a hearing on a habeas corpus petition because of an inability to determine whether the state court, after a *Huntley* hearing, had found the confession voluntary because of an erroneous view of the law or because of a resolution of factual issues against the petitioner. The Court concluded that under all of the circumstances the federal courts could be reasonably certain that the correct standard had been applied and that no federal hearing was necessary or proper. Although the state court had made no specific findings of fact, there was no evidence that the wrong standard had been utilized and the determination was made on the "totality of the circumstances" with the proper factors apparently considered.

Here, by way of contrast, the state judge did not indicate in any way in his *Huntley* opinion that his earlier erroneous view of the law had changed since 1958. He recounted all of the testimony before him with emphasis on the allegations and denials of physical abuse but with no reference to mental coercion. He discussed the credibility of petitioner's witnesses, but their testimony only related to the allegations of physical beatings. Finally, he expressly concluded only that the confession was not the result of "physical" coercion. In contrast to *Delle Rose*, there is no indication here that the correct law was applied. However, there is significant evidence that an important doctrine of law was simply ignored.

S.Ct. 1203, 35 L.Ed.2d 637 (1973) (*per curiam*). Nor can we say, after an examination of the record, including the *Huntley* hearing transcripts, that the state factual determination is not fairly supported by the record as a whole or that there are any other defects in the state court proceedings.

[7] Although not an issue specifically raised by the state, we are satisfied that the denial of Lewis' previous application for habeas corpus relief in the federal courts cannot bar consideration of the instant petition. The previous denial could only constitute a bar if: (1) the grounds for relief in the present application were determined adversely to Lewis in the prior application, (2) the prior determination was on the merits and (3) the ends of justice would not be served by reaching the merits of this application. *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). There is no question that the claims presented in the present application were also presented in the prior one. However, as we have shown, Lewis' allegations concerning mental or psychological coercion raise issues of fact that were not resolved and probably not even considered by the state court. The prior adjudication of the district court on Lewis' first pro se petition[8] appears to have ignored these issues also. The district court did not mention them and Judge Curtin simply concluded that the confession was "not the result of physical coercion of any kind." In these circumstances a decision without a hearing, much less any mention of the mental coercion issue, is not on the merits and cannot bar consideration of the instant petition. *Id.* at 16, 83 S.Ct. 1068; see *Saville v. United States*, 451 F.2d 649, 650 (1st Cir. 1971).

[8] Since a state court conviction tainted by an involuntary confession cannot stand under the Due Process Clause, *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Payne v. Arkansas*, *supra*, 356 U.S. at 567–68, 78 S.Ct. 844, the decision below is reversed as to the issue of mental and psychological coercion and the case is remanded to the district court for a hearing to resolve the factual disputes surrounding that issue.

8. It has been suggested that if the prior application was denied without appointment of counsel any subsequent application must be considered on its own merits and not summarily denied on the basis of the previous denial. *Tucker v. United States*, 138 U.S.App.D.C. 345, 427 F.2d 615, 617–18 n.13 (1970). We do not explicitly rest our decision on that ground, although lack of counsel may explain why the district court was apparently unaware of the mental coercion claim in the prior application.

In re GRAND JURY PROCEEDINGS.

Jasper M. BRANCATO et al., Appellees,

v.

UNITED STATES of America, Appellant.

No. 75–1139.

United States Court of Appeals, Eighth Circuit.

Submitted June 11, 1975.

Decided July 11, 1975.

Rehearing and Rehearing En Banc Denied Aug. 4, 1975.

The United States District Court for the Western District of Missouri, William H. Becker, Chief Judge, granted motion to suppress and return records produced in response to federal grand jury subpoena duces tecum and Government appealed. The Court of Appeals, Kilkenny, Circuit Judge, held that sellers of inn who agreed to deliver to purchaser all business records had no protectable interest in records which were locked in

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

David L. Bird, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for appellant herein. On the 21st day of September, 1976, he served the annexed upon the following named person :

Laurence Stern. ESQ
11 Monroe Place
Brooklyn, N.Y. 11201

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

David L. Bird

Sworn to before me this
21st day of September, 1976

Assistant Attorney General
of the State of New York